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Recommended Citation

Steven R. Greenberger, *Democracy and Congressional Tenure*, 41 DePaul L. Rev. 37 (1991)

Available at: <https://via.library.depaul.edu/law-review/vol41/iss1/3>

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DEMOCRACY AND CONGRESSIONAL TENURE

Steven R. Greenberger*

The story of the end of the twentieth century writ large is the advancing triumph of democracy throughout the world. It is now possible to circumnavigate the planet—crossing Russia, Eastern and Western Europe, North America and back—without setting foot in a nation where popular sovereignty is not the order of the day. In an irony so profound as to be unimaginable even a few short years ago, the ultimate landmark of Communist tyranny, the Berlin Wall, has been dismantled and is being sold in pieces by nascent entrepreneurs anxious to begin to order their own lives. This is not to say that the recent march of freedom has been either uninterrupted or universal, or that the tide is necessarily irreversible; the massacre of Chinese students at Tienanmen Square and the reactionary putsch in the (former?) Soviet Union, although thankfully unsuccessful, among other events, counsel caution in concluding that totalitarian rule may confidently be consigned to the “dustbin of history.” Nevertheless, the sheer indomitability of the human spirit and thirst for liberty evidenced by the willingness of ordinary citizens to stand up to tanks after decades of living under dictatorial repression is cause for extended celebration.

But if the global headline trumpets the ascendance of democracy, the twentieth century fin de siècle subtext in this country, according to James Otteson and others, is that our own democracy, or at least democratic decision-making in Congress, is foundering. Mr. Otteson, in *A Constitutional Analysis of Congressional Term Limits: Improving Representative Legislation Under the Constitution*,¹ at turns characterizes Congress as “inept,” “ineffective,” and, most seriously, as having lost its “representative legitimacy.”² As a consequence, he argues that members of both Houses of Congress ought to be restricted to a single term. As I argue below, I think that Mr. Otteson is mistaken in both his diagnosis and prescription: By and large Congress functions effectively, and rather than enhancing representative legitimacy, term limitations will serve only to weaken Congress, particularly vis-à-vis the other branches of government. As a general proposition, however, it is well to observe that at a time when people throughout the world are risking their lives

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I would like to express my thanks to Marlene Nicholson and Suzanne Ehrenberg for their help and to Georgann Grabiec for her research assistance.

1. James C. Otteson, *A Constitutional Analysis of Congressional Term Limits: Improving Representative Legislation Under the Constitution*, 41 DEPAUL L. REV. 1 (1991).

2. *Id.* at 2, 13.

for the right to freely choose their leaders, advocates of limitations on the menu of available electoral choices must shoulder a heavy burden of persuasion.

I. THE TEACHING OF THE CONSTITUTION

Article I of the Constitution establishes the formal framework for the organization of the national Congress in which the legislative powers enumerated in the Constitution are vested. The organizational blueprint is somewhat detailed. Congress is divided into the Senate and House of Representatives. Members of the former are elected two from each state for six-year terms, with one-third of their number elected every other year.³ Senators must be at least thirty years old, United States citizens for nine years, and residents of the states from which they are elected.⁴ Representatives are elected biennially, must be at least twenty-five, must have been United States citizens for seven years and, interestingly, although they must represent districts of equal population, need only reside in the *state* (rather than the district) from which they are elected.⁵ All members of Congress are now popularly elected.⁶

What is missing from the foregoing list, of course, is any restriction on the length of time in Congress that senators and representatives may serve. That omission from Article I represents a deliberate decision by the Framers of the Constitution and not an oversight. They rejected the call for limitations similar to the three-year term limitation of the Articles of Confederation⁷ and the limitations established by several state constitutions at the time.⁸ They chose instead to let the electorate determine how long any particular member of Congress should continue to serve.

Mr. Otteson's contention that the text and history of Article I support his argument for congressional term limitations is accordingly curious; his position was explicitly considered and rejected. While sliding over this rather difficult truth, he nevertheless offers two alternative readings of Article I to support his view, one serious and the other rather not. The latter focuses on the requirement that congresspeople reside in the states from which they are elected. He suggests that the residency requirement is being flouted because the residence of long-tenured lawmakers is now in reality Washington, D.C., rather than

3. U.S. CONST. art I, § 3, cl. 1-2.

4. U.S. CONST. art. I, § 3, cl. 3.

5. U.S. CONST. art. I, § 2.

6. The members of the House of Representatives have always been popularly elected. U.S. CONST. art. I, § 2, cl. 2. Senators were originally elected by state legislatures. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII. The 17th Amendment, ratified in 1913, amended the Constitution to provide for the direct popular election of senators as well.

7. CONGRESSIONAL QUARTERLY, GUIDE TO CONGRESS 24 (3d ed. 1982) [hereinafter GUIDE TO CONGRESS]; Timothy Egan, *Building on Mistrust of Officials, Voters in West Try to Limit Terms*, N.Y. TIMES, Sept. 23, 1991 (nat'l ed.), at A1.

8. See, e.g., PA. CONST. of 1776, ch. II, § 8 (limiting legislators to no more than four terms in a seven-year time period); VA. CONST. of 1776, para. 4 (providing for rotation of senators).

their purported home states.⁹

This interpretation strikes me as silly, especially when assayed in historical terms. Assuming *arguendo* that the residency requirement is intended to ensure that citizens are represented by individuals familiar with local conditions, that familiarity is far less difficult to come by for a representative absent from his local home while attending to the nation's business today than it was at the end of the eighteenth century. Journeying to the national Capitol from remote regions of the country was then an arduous task, not easily undertaken, and communication over any appreciable distance was exclusively by mail. In the contemporary age, characterized by instantaneous communication and supersonic travel, I suspect that for many lawmakers the problem is not that they are unaware of what their constituents think, but instead that, particularly concerning controversial issues, they are intimately aware and are summoned home to explain their positions rather more regularly than they would like.

Mr. Otteson's somewhat weightier argument is that the grant of legislative power in Article I ought to be informed by the purposes of the national government set forth in the Preamble.¹⁰ This seems unexceptionable as far as it goes; federal law *should* help to "insure domestic Tranquility," "promote the general Welfare," and "provide for the common defence"¹¹ (although, as we will see, the assessment of whether those laudable goals have been furthered in other than a process sense is probably not a meaningful inquiry). And it follows as well that if Congress, or for that matter any other branch or organ of government, is demonstrably and systematically acting in a manner injurious to the purposes for which the Constitution was ordained and established, then reform is in order. Article V presumably proves that much.¹² But notwithstanding the current affection for the Preamble shown by Professor Amar,¹³

9. Otteson, *supra* note 1, at 15-16.

10. The Preamble provides:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbl.

11. *Id.*

12. Article V establishes the manner in which the Constitution may be amended. It provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

U.S. CONST. art. V.

13. See, e.g., Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1056-58 (1989); Akhil R. Amar, *Of Sovereignty and Federalism*,

among others, it is hard to see how it can possibly be viewed in this context as anything other than an admonition. I know of no case that holds, or scholar who contends, that the Preamble might trump a substantive constitutional provision; the Supreme Court could not order term limitations as a remedy in a lawsuit claiming that Congress had failed to act, for example, to "insure domestic Tranquility."¹⁴ Since limiting congressional tenure cannot be accomplished as a matter of constitutional interpretation and will, instead, probably require constitutional change,¹⁵ the only real question is whether such a change is a wise idea. I attempt to supply an answer to that question below.

II. THE CASE AGAINST TERM LIMITATIONS

The increasingly powerful populist appeal of term limitations is an undeniable phenomenon. California, Colorado, and Oklahoma adopted such limitations last year,¹⁶ and referenda drives have been initiated in every other state in the West, save Hawaii and New Mexico, for placement on the ballot next year.¹⁷ The success of the term limitation movement is all the more remarkable since, in light of the unsurprising antipathy of elected officials who are the movement's targets, supporters must accomplish their objective through the relatively more difficult mechanism of ballot initiatives rather than via legislation.

Of the limits currently in effect, only Colorado's includes federal as well as state officeholders.¹⁸ Colorado's senators and representatives are limited to a

96 YALE L.J. 1425, 1455-62 (1987).

14. The Supreme Court would almost certainly refuse to entertain such an action because it would pose a nonjusticiable political question outside the Court's institutional capacity to decide. For an insightful treatment of the political question doctrine, see generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1965).

15. It is a nice question, though beyond the scope of this Article to resolve, whether the states may limit the terms of their federal representatives themselves or whether such limitations require an act of Congress or a constitutional amendment. Section 4 of Article I empowers the state legislatures to determine "[t]he Times, Places and Manner of holding Elections for [United States] Senators and Representatives," subject to Congress' right to supersede state regulation if it so chooses. U.S. CONST. art. I, § 4. At the same time, Section 5 of Article I establishes each house of Congress as "the Judge of the Elections, Returns and Qualifications of its own members." U.S. CONST. art. I, § 5. Whether term limitations fall under Section 4 or Section 5 is not *prima facie* clear. The limitation of the President to two terms was accomplished via the 22nd Amendment, but that is not something the states could have accomplished in any event. For discussions of the constitutionality of term limitations, see LAURENCE C. DODD & RICHARD L. SCHOTT, *CONGRESS AND THE ADMINISTRATIVE STATE* 92-105 (1979); Lloyd N. Cutler, *Now is the Time for All Good Men . . .*, 30 WM. & MARY L. REV. 387 (1989); Mark V. Tushnet, et al., *Judicial Review and Congressional Tenure: An Observation*, 66 TEX. L. REV. 967 (1988).

16. CAL. CONST. art. IV, § 2 (amended 1990); COLO. CONST. art. XVIII, § 9 (amended 1990); OKLA. CONST. art. V, § 17a (amended 1990).

17. Egan, *supra* note 7, at A1.

18. Article XVIII of the Colorado Constitution provides:

§ 9. U.S. senators and representatives—limitations on terms

(1) In order to broaden the opportunities for public service and to assure that members of the United States Congress from Colorado are representative of and respon-

total of twelve consecutive years in Congress, although those serving at the time the limitations were imposed were exempted.¹⁹ Many of the proposed initiatives in other states also include federal as well as state officials.²⁰ The most draconian proposal will be taken up by the voters of Washington State in November 1991. The Washington initiative will limit the terms of all the state's legislators, state and federal, and of the governor.²¹ State and federal

sive to Colorado citizens, no United States Senator from Colorado shall serve more than two consecutive terms in the United States Senate, and no United States Representative from Colorado shall serve more than six consecutive terms in the United States House of Representatives. This limitation on the number of terms shall apply to terms of office beginning on or after January 1, 1991. Any person appointed or elected to fill a vacancy in the United States Congress and who serves at least one half of a term of office shall be considered to have served a term in that office for purposes of this subsection (1). Terms are considered consecutive unless they are at least four years apart.

(2) The people of Colorado hereby state their support for a nationwide limit of twelve consecutive years of service in the United States Senate or House of Representatives and instruct their public officials to use their best efforts to work for such a limit.

(3) The people of Colorado declare that the provisions of this section shall be deemed severable from the remainder of this measure and that their intention is that federal officials elected from Colorado will continue voluntarily to observe the wishes of the people as stated in this section in the event any provision hereof is held invalid.

COLO. CONST. art. XVIII, § 9 (amended 1990).

19. COLO. CONST. art. XVIII, § 9, cl. 1 (amended 1990).

20. Egan, *supra* note 7, at A1.

21. The Washington initiative provides:

Initiative Measure 553

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1. A new section is added to chapter 43.01 RCW to read as follows:

A person elected to the office of governor or lieutenant governor is eligible to serve not more than two consecutive terms in each office.

NEW SECTION. Sec. 2. A new section is added to chapter 44.04 RCW to read as follows:

A person elected to the Washington state legislature is eligible to serve not more than three consecutive terms in the house of representatives and not more than two consecutive terms in the senate. In addition, no person may serve more than ten consecutive years in any combination of house and senate membership. Terms are considered consecutive unless they are at least six years apart. Therefore, elected legislators who have reached their maximum term limits are eligible for legislative office after an absence of six years from the state legislature. Persons who have already reached the maximum term of service on the effective date of this act are eligible to serve one additional term in either the state house of representatives or the senate.

NEW SECTION. Sec. 3 A new section is added to chapter 29.68 RCW to read as follows:

A person elected to the United States congress from this state is eligible to serve not more than three consecutive terms in the United States house of representatives and not more than two consecutive terms in the United States senate and not more than twelve consecutive years in any combination of United States house and senate membership. Terms are considered to be consecutive unless they are at least six years apart. Therefore, elected legislators who have reached their maximum term limits are

House members will be restricted to a total of six years, the governor to eight,

eligible for legislative office after an absence of six years from the United States congress. Persons who have already reached the maximum term of service on the effective date of this act are eligible to serve one additional term in either the United States house of representatives or senate.

NEW SECTION. Sec. 4. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Supporting and opposing arguments accompany the initiative for the benefit of voters. Those statements provide:

Statement For:

Term Limitation Is A Crucial Bi-partisan Government Reform

Vote YES for Initiative 553 for *real* political reform. That's why over a quarter million Democrats, Republicans, and Independents signed this initiative. I-553 will solve a fundamental problem in our political system: the need to limit the number of years a politician can stay in a particular office. *Vote YES on I-553 for necessary government reform!*

Return Control of OUR Government to the People—Where It Belongs

"Experienced" career politicians, financed by PACs and special interest money, have brought us the S&L scandal, a \$3 trillion national debt and elected officials' excessive pay raises. Term limitation will make it more difficult for lobbyists to maintain their influence with elected officials. Our Founding Fathers envisioned citizen legislators, not career politicians. *Vote YES on I-553 to reduce special interest influence.*

Reduce the Influence of Lobbyists and Special Interests

Re-election is a politician's top priority. Nothing proves it more than the outrageous growth in campaign spending using PAC and special interest money. We have a system where incumbents, who choose to run, nearly always win—96% re-elected to Congress in 1990, 96% re-elected to the Washington State Legislature. Excellent candidates are discouraged from running against incumbents. *Vote YES on I-553 to provide opportunities for fair competition.*

Term Limitation Is a National Movement

Our President and 31 governors have term limits. Oklahoma, Colorado and California passed term limits in 1990. Term limitation movements are underway in 22 states for 1992. Nationally, incumbency has taken over our political system and voters are staying home. *Vote YES on I-553 to regain meaningful choice at the voting booth, locally and nationally.*

Vote YES on I-553 to assure a responsive citizen legislature.

Rebuttal of Statement Against:

Scare tactics and doomsaying are desperate maneuvers by career politicians who don't want to give up their power and perks.

Thomas Jefferson was the original advocate for term limitations because he foresaw the problems associated with the accumulation of power.

I-553 makes our representatives more accountable to us. What's so radical about that? Ask yourself this question. If special interests and bureaucrats will flourish under term limits, why are they so opposed to term limits?

For more information call (206) 475-8650.

Statement Against:

- Initiative 553 is a radical effort to reform politics which will do more harm than good.
- Today we can choose which officials to keep and which have been there too long. 553 would take that choice away. Between 1979 and 1989 we turned over 81% of our legislature. Almost a quarter were new in 1991. Washington voters are turning

and senators to twelve.²² Unlike in Colorado, however, current officeholders in Washington will not be "grandfathered in" beyond a modest three-year reprieve extending only until November 1994.²³ At that time the House career of the Speaker, Thomas Foley, among others, will be brought to an end.

The limitation movement is undoubtedly reflective of a widespread perception of congressional ineffectiveness, of a national legislature hamstrung by the need to curry favor with "special interests" to obtain reelection largesse, interested exclusively in self-preservation and unable or unwilling to respond to what appear to be increasingly intractable social problems. The final straw for many, including Mr. Otteson, was the so-called "budget fiasco" at the end of 1990, when government operations were halted for a time by the lack of agreement on a deficit reduction package.²⁴ But is this perception of congressional shortcomings accurate? And by what measure is the performance of Congress to be judged?

A. Congress and the Concept of Representative Legitimacy

One standard against which to evaluate Congress is the degree of its representativeness of the citizenry. As a formal matter under Article I, representativeness means congresspeople must be elected by majority vote from their

incumbents out *now*. This initiative is a solution to a problem that doesn't exist.

- If 553 passes, we will lose all our Congressional delegation in 1994. Speaker of the House Tom Foley and past giants such as Scoop Jackson, Dan Evans and Warren Magnuson have protected us against powerful east coast interests. How will newcomers have the clout to protect the electric rates and irrigation rights which underpin our economy? How can we prevent the closure of a Whidbey Island Naval Air Station and keep supertankers out of Puget Sound? Do we want offshore oil drilling? There's too much to lose.
- Without senior members, the Legislature will have less institutional memory, and the influence of professional lobbyists and appointed bureaucrats will increase.
- 553 won't take big money out of campaigns. And it will actually reduce competition. Why run against an incumbent when you can wait for an automatic open seat?
- If 553 passes, we'll lose good people with the bad. And will the new ones be better—or just know less?

Rebuttal of Statement For:

Term limitation is NOT a national movement. Only one state has done what Initiative 553 would do. Most people recognize that to send newcomers to Congress while other states don't would be to lose the power to protect the regional economy and natural resources.

Initiative 553 will NOT reduce the influence of special interests. We need to take big money out of campaigns. Initiative 553 will not do that.

You should decide who to vote for. Vote no on Initiative 553.

Initiative 553 (copies available through the Office of the Secretary of State, State of Washington).

22. *Id.* § 3.

23. *Id.*

24. See, e.g., Richard Morin, *Majority in Post-ABC Poll Blames Crisis on Congress*, WASH. POST, Oct. 9, 1990, at A8 (reporting that 57% of Americans surveyed blamed Congress for failure to reach agreement with administration on federal budget).

jurisdiction of residence.²⁵ Congress is certainly representative in this important sense; Article I's requirements serve at a minimum to ensure the people's opportunity to participate in the lawmaking process via the election of their congressional representatives. Moreover, the condition upon which the vicarious exercise of popular sovereignty through the legislative process depends most fundamentally—the right to vote—has been protected and expanded enormously over time. The Fifteenth,²⁶ Nineteenth,²⁷ and Twenty-Fourth²⁸ Amendments and the Voting Rights Act²⁹ have enfranchised millions of Americans previously without an electoral voice. For the most part, the electorate's decisions are also no longer subject to nullification by vote fraud of the type that, in the past half-century, sent Lyndon Johnson to the Senate³⁰ and

25. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

26. The 15th Amendment enfranchised the newly freed slaves. It provides:

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV.

27. The 19th Amendment enfranchised women. It provides:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIX.

28. The 24th Amendment banned the use of poll taxes. It provides:

SECTION 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by any reason of failure to pay any poll tax or other tax.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XXIV.

29. 42 U.S.C. § 1971 (1988). The Voting Rights Act is perhaps the most important civil rights legislation ever enacted. It prohibits racial discrimination in voting by, *inter alia*, suspending the use of literacy tests and other similar voting qualifications, mandating federal pre-approval of all future changes in election law and practice in jurisdictions with a history of discrimination, excusing payment of accumulated, unpaid poll taxes and supplying federal poll watchers to aid in preventing violations. A century after the ratification of the 15th Amendment, the Voting Rights Act finally made the Amendment's guarantee of the vote to African-Americans a reality.

30. The story of Lyndon Johnson's 1948 senatorial campaign is one of the most extraordinary tales in the annals of American politics. Johnson "won" the Democratic primary, the only election that mattered at that time in Texas, by a total of 87 votes, less than 1/100 of one percent of the votes cast. Johnson's slim margin of victory was provided by a late change in the returns from a remote south Texas region known as the "Valley." Originally, the counties in the Valley reported several hundred fewer votes for Johnson than they later certified. The "corrected" Valley vote total was not reported until *six days* after the election. One county in the Valley, Duval County, reported its vote as 4,620 to 40 in favor of Johnson. The combined vote for Johnson and his opponent represented a 99.6% turnout of the County's eligible voters! Johnson's theft of the 1948 election is fascinatingly chronicled in ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT* (1990).

some say sent John Kennedy to the White House.³¹

In addition to universal suffrage, constitutional representativeness also arguably requires that the people's chosen representatives themselves not effectively be disenfranchised within Congress. Regrettably, for much of the past hundred years that was all too often the case. From its inception, Congress borrowed the British parliamentary practice of introducing bills first on the floor of the chamber and then referring them to committee for study, with the committee then reporting the bills back for consideration by the entire body.³² Congressional committees were initially only temporary, dissolved when their reporting function was complete.³³ By the end of the nineteenth century, however, committees had become a permanent fixture of the legislative landscape, wielding broad power with such unbridled autonomy that "Congress was frequently said to have abdicated its lawmaking function to its committees."³⁴

By itself, committee control of the legislative process was perhaps not overly worrisome; Congress' ability to respond to issues posed by the increase in economic activity associated with the Industrial Revolution and the nation's territorial expansion probably made an institutionalized division of labor into some type of committee structure inevitable. What was troubling was the use of seniority as the sole criterion for ranking members on committees, thereby ensuring that the most senior member of the majority party always served as the committee chairman.³⁵ Coupled with the almost dictatorial power that chairmen were afforded over committee operations, power and influence in Congress became concentrated in the hands of a small group of superannuated chairmen who reigned with virtual sovereignty over their respective realms.³⁶ Woodrow Wilson, then a professor of Government at Princeton, called the structure "a government by the Standing Committees of Congress."³⁷

The impact of the seniority system on the representativeness of Congress was substantial, particularly during times of social change. Aged committee chairmen were often out of step with their own committee members, congressional leadership, Congress as a whole, and the national electorate.³⁸ One notorious example was Representative Howard W. Smith, Chairman of the powerful House Rules Committee during much of the civil rights movement in the 1950s and 1960s, who repeatedly bottled up widely supported civil rights legislation.³⁹ It sometimes seemed as if a few old men were thwarting the will of

31. Richard Nixon certainly makes out at least a *prima facie* case, as have others, that vote fraud in Chicago and Texas cost him the 1960 election. See RICHARD M. NIXON, R.N: THE MEMOIRS OF RICHARD NIXON (1990).

32. CONGRESSIONAL QUARTERLY, CONGRESS A TO Z 85 (1988) [hereinafter CONGRESS A TO Z].

33. *Id.*

34. *Id.* at 86.

35. *Id.*

36. *Id.*

37. WOODROW WILSON, CONGRESSIONAL GOVERNMENT 55-56 (1885).

38. CONGRESS A TO Z, *supra* note 32, at 86.

39. See NELSON W. POLSBY, CONGRESS AND THE PRESIDENCY 149-52 (3d ed. 1976).

the nation.

During the 1970s, however, Congress found reform, largely as a result of pressure from the House Democrats who took office in the post-Watergate election of 1974.⁴⁰ Both parties in both chambers determined to choose their committee leaders by vote of all party members in caucus.⁴¹ The House Democratic Caucus then proceeded to remove three chairmen in 1975, and removed several others in ensuing years.⁴² And while many senior chairmen remained, all were aware that they were henceforth answerable for their actions to their party's membership. Legislative power was also diffused by relieving chairmen of exclusive control of committee resources, and by spreading the authority of many committees among new subcommittees run by junior members.⁴³ The vote necessary to invoke cloture to end a filibuster in the Senate was also reduced from two-thirds to sixty percent.⁴⁴

The diffusion of power in Congress effected by these reforms has made Congress a far more representative institution than it had historically been. It is no longer the private preserve of a tiny group of tyrannical titans. Individual legislators, and therefore the constituents they represent, now stand on a vastly more equal footing with each other; voters represented by a relatively junior legislator are no longer effectively voiceless. Moreover, as I pointed out above, the people's aggregate ability to participate in the political process through voting for and communicating with their representatives has also never been greater. Measured against these criteria, Congress as an institution is quite representative.

It is true that congressional reform has not come without a price. Sharing power means that some of those who hold it must give some of it up. There is then less reason for deference on the part of the newly empowered, and correlatively less ability to command deference by those whose power is reduced. Thus, as control over the "tools" of "persuasion" in Congress—committee assignments, patronage, the placement of favored bills on the legislative calendar—is more widely dispersed, leadership becomes more difficult. The former Speaker of the House, Jim Wright, described himself as left by reform with merely a "hunting license to persuade."⁴⁵

Ultimately, a leadership shorn of its carrots and sticks may be hard put to forge the consensus necessary to get legislation enacted. The breakdown of party discipline, attributable to a weakened leadership, has, in fact, been (erroneously) cited as underlying Congress' inability to agree upon the fiscal 1991 budget.⁴⁶

40. CONGRESS A TO Z, *supra* note 32, at 86.

41. *Id.*

42. *Id.*

43. GUIDE TO CONGRESS, *supra* note 7, at 486.

44. *Id.* at 432-33.

45. Janet Hook, *Budget Ordeal Poses Question: Why Can't Congress Be Led?* 48 CONG. Q. WKLY. REP. 3471, 3472 (1990).

46. *Id.*

There may accordingly be something of an inherent tension in Congress between representativeness and effectiveness, although we know from the era when the seniority system was in its heyday that the power to act also carries with it the power to obstruct. For my part, I would gladly sacrifice a chunk of effectiveness for a bit of representation. That is partly because I share the Framers' bias against concentrations of power and partly because I do not want to see a return to the Congress of the 1950s. But it is also because the trade-off is not all that severe. As I argue below, the criticisms of Congress' performance are, in my estimation, largely partisan and, on the whole, mistaken.

B. *Evaluating Congressional Effectiveness*

Congress has never been, and never will be, a widely popular institution. In many respects it suffers in comparison with the Executive: It is faceless. No individual member commands the loyalty of more than a small fraction of the national electorate. It is ponderous, not constituted to move swiftly. It cannot act alone. Everything it accomplishes requires at least the acquiescence of the President. It is the arena in which the competing preferences of the most diverse society in the world are compromised, and its actions as a whole will never, therefore, be entirely satisfactory to anyone. It is an easy target.

Congress appears particularly impotent when it is not controlled by the President's party. Unless it can mount veto-proof majorities, its role consists largely in thwarting and parrying presidential initiatives. Particularly when locked in combat over an extended period with a popular President armed with a national electoral mandate that it necessarily lacks, Congress often seems simply an obstacle to accomplishment of the President's agenda.⁴⁷

This is, of course, precisely the state of affairs that has existed for much of the last decade. Presidents Reagan and Bush have been popular Presidents confronted by a Democratically controlled Congress. Owing to deep ideological disagreements, Congress has opposed many of the Reagan-Bush policy initiatives. The more successfully Congress resisted those initiatives, the more obstructionist it appeared, and the greater the perceived need in the Republican Party to do something about it.

The fact of the matter is that much, although not all, of the agitation for term limitations is coming from Republican and conservative groups.⁴⁸ The primary financier of the limitation movement in the Western states is an organization with conservative ties headquartered (ironically enough) in Washington, D.C., billing itself as "Citizens for Congressional Reform."⁴⁹ It has provided almost all of the funding for the initiative in Washington State.⁵⁰

47. See, e.g., Godfrey Sperling, *A Preview of Bush's 1992 Campaign*, CHRISTIAN SCI. MONITOR, Oct. 8, 1991, at 18.

48. See Egan, *supra* note 7, at A1.

49. *Id.*

50. *Id.*

Press reports indicate that workers were being paid a bounty for each signature they obtained on petitions to place the initiative before the voters.⁵¹ The movement for congressional limitations has also been endorsed by President Bush.⁵²

That term limitations have been seized upon by Republicans as a short-cut to achieving congressional ascendance for themselves does not mean that the idea should necessarily be rejected as a mere partisan ploy. Not all advocates of limitations are conservatives, and the movement has garnered too much popular support to be dismissed out of hand.⁵³ Like any other idea, it ought to be evaluated on its merits. But the movement's primarily partisan cast, and the easy Congress-bashing that has gone along with it, suggest that it ought to be approached with caution. At a minimum, proponents of limitations must demonstrate that for systemic reasons Congress is functioning in a manner inimical to the national interest rather than merely passing laws they dislike or failing to pass laws they do. And proponents then must show that limiting tenure will cure the flaws they identify without making things worse. I submit that they cannot do either.

As an initial matter, there is hardly a consensus on what the national interest is. Promoting the general welfare sounds laudable but is an inadequate practical guide to the resolution of particular policy disputes. Should the pending civil rights bill⁵⁴ be enacted to guarantee workplace equity or rejected as a quota bill unfairly disadvantaging whites? How much of the "peace dividend" should be reallocated to domestic programs, and to which ones in what amounts? Saying that Congress should choose whatever option furthers the national interest is platitudinous. This, however, does not render the admonitions of the Preamble meaningless. Aspects of congressional *organization and procedure* that effectively disenfranchised voters, such as the old seniority system, were justifiably changed for running afoul of the representativeness principle embodied in Article I. But criticizing Congress for failure to act where its inaction stems from ideological disagreement, whether internally or with the Executive, as was the case, for example, with the FY 1991 budget, is just playing politics.

Much of the work of contemporary public choice theorists confirms that the notion of a general national interest understood as anything other than the aggregate outcomes of the political process is illusory.⁵⁵ The legislature is the

51. *Id.*

52. *Id.*

53. See *supra* text accompanying notes 16-17 (noting that Colorado, California, and Oklahoma adopted tenure limitations last year, and referenda drives have been initiated in numerous other western states).

54. H.R. 1, 102d Cong., 1st Sess. (1991). See also proposed amendments to H.R. 1: S. 1409, 102d Cong., 1st Sess. (1991); S. 1408, 102d Cong., 1st Sess. (1991); S. 1407, 102d Cong., 1st Sess. (1991).

55. The seminal works of public choice theory are probably KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963) and DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1958).

designated vessel within which the claims of competing interest groups are resolved, but it is incapable of adjusting those claims against some higher, external standard. Legislative purpose is simply not a meaningful concept. While public choice is not without its critics,⁵⁶ it does suggest that, so long as universal participation in the system is assured, the search for a nonpolitical definition of the national interest is futile.⁵⁷

At this point, one might respond that I have contrived to make my opponents' job impossible. If they must prove that Congress is acting inimically to the national interest, but the national interest is not susceptible of definition, then I may win the debate, but only by default. I do not believe this to be the case. My contention is merely that they must advance process- rather than outcome-based arguments in support of their position. I believe that there are some important such arguments, although their explication and evaluation is best undertaken as part of my later discussion of the effect the imposition of term limitations would have upon our constitutional system. However, because the fate of limitations proposals will be determined in the political arena, and outcome-based arguments are being made, it is worth briefly examining Congress' recent performance.

The last Congress enacted important legislation to, inter alia, make the environment cleaner,⁵⁸ aid children⁵⁹ and bring Americans with disabilities into the workplace.⁶⁰ It carefully and deliberately performed its constitutional role of deciding whether we should go to war in the Persian Gulf,⁶¹ in what many

56. As an application of economic analysis to the actions of legislatures, public choice is subject to all of the familiar criticisms leveled at the law and economics movement generally: the underestimation of the extent of market failure; the overemphasis on quantification of nonmonetary interests; and the application of macroeconomic principles to microeconomic decision-making. For a primer on public choice, see DANIEL FARBER & PHILIP FRICKEY, *LAW & PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); Other sources on public choice include William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 875 (1991); Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and Republican Government*, 75 IOWA L. REV. 949 (1990); Jonathan R. Macy, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

57. See, e.g., William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988) (suggesting that even public interest legislation, such as the Civil Rights Act of 1964, may profitably be understood as the bargain of competing interest groups rather than as the reflection of a transcendent national purpose). In its rejection of intent and purpose, public choice theory is somewhat reminiscent of Justice Brandeis' criticism and rejection of the notion of a transcendent body of federal law in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

58. See Clean Air Act, Pub. L. No. 101-549, 104 Stat. 2399 (codified at 42 U.S.C.A. §§ 7401-7671 (West 1991)).

59. See Augustus F. Hawkins Human Services Reauthorization Act of 1990, Pub. L. No. 101-501, 104 Stat. 1222 (codified at 42 U.S.C.A. § 9834 (West 1991)) (increasing funding for Head Start program from \$1 billion in 1990 to \$2 billion in 1991, \$4 billion in 1992, \$5 billion in 1993, and \$7 billion in 1994).

60. See Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C.A. §§ 12101-12213 (West 1991)).

61. Article I of the Constitution grants Congress the authority to declare war. U.S. CONST. art.

on both sides of the aisle and throughout the nation described as the finest debate they had ever seen.⁶² And perhaps most impressively in light of the pork-barreling charge so often leveled against it, and the catastrophic effects that closing military bases will have in some of the members' states and districts, Congress agreed with remarkably little rancor upon a schedule for closing military bases rendered superfluous by the end of the Cold War.⁶³ If it is possible to speak in terms of the national interest divorced from partisan politics, then all of these actions furthered it.

As I have intimated at several points above, perhaps the principal criticism of Congress has been its perceived inability to bring the federal deficit under control. To all appearances, we are indeed living beyond our means. As a percentage of the gross national product, federal borrowing during the 1980s reached the highest peacetime level in history.⁶⁴ In the last ten years, the total national debt has grown from one-quarter to over one-half of GNP, higher than at any time since the mid-1950s.⁶⁵ We are now \$3 trillion in the red.⁶⁶

Term limitation proponents, including Mr. Otteson, lay the blame for the spiraling national debt at the feet of Congress.⁶⁷ The alleged problem is that Congress spends too much, primarily because members benefit individually from spending on government projects in their districts but are not held accountable for fiscal policy as a whole. They are also unwilling to oppose projects favored by their colleagues for fear of retribution against their own projects. And they will not pass tax increases to pay the bill for fear they will be voted out of office. So they borrow the money, increasingly from foreign investors.⁶⁸

This story has considerable intuitive appeal, but it just is not an accurate account of national fiscal policy over the past decade. First, a deficit itself is not inherently bad. Keynes taught us that.⁶⁹ It depends on how the money is spent. Just as prudent citizens often borrow substantial sums to invest in themselves in order to obtain an education to enhance their future productivity, so, too, should the government borrow funds to enhance our collective productivity by improving our educational and economic infrastructure when necessary. A representative who secures funds, for example, to open a job retraining

I, § 8, cl. 11.

62. See, e.g., David S. Broder, *Bravo Congress*, WASH. POST, Jan. 15, 1991, at A21; *Round One—and Beyond: The Suspense, at Least, is Over*, N.Y. TIMES, Jan. 18, 1991, at A30 (editorial).

63. See, e.g., *Pain, Limited. Bases, Closed*, N.Y. TIMES, Aug. 1, 1991, at A20 (editorial).

64. ROBERT S. MCINTYRE, *CITIZENS FOR TAX JUSTICE, INEQUALITY & THE FEDERAL BUDGET DEFICIT 1* (1991) [hereinafter *CITIZENS FOR TAX JUSTICE*].

65. *Id.* at 1, 2.

66. Francis X. Clines, *Kremlin to Look for Investments at London Summit*, N.Y. TIMES, July 10, 1991, at A1.

67. Otteson, *supra* note 1, at 17-18.

68. *Id.* at 17.

69. See JOHN M. KEYNES, *A TREATISE ON MONEY* (1930) (establishing the importance of deficit finance as a countercyclical tool to combat a slowdown in economic growth); JOHN M. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* (1935) (same).

center for laid off workers in his district may be acting partly out of self-interested concern for his own reelection, but that doesn't mean the project is a bad idea.

Second, budgetary "pork," in the sense of local public works projects, is a decreasing rather than increasing share of the federal budget.⁷⁰ Aside from defense expenditures, which have always had a major local impact but are being slashed,⁷¹ most of the budget is devoted to entitlements.⁷² With the possible exception of states like Florida and Arizona, which have a disproportionate number of social security recipients, spending on entitlements does not benefit particular congresspeople.

Third, and by far most importantly, total spending on federal *programs* as a share of GNP, including defense, is *lower* than at any time since 1960.⁷³ While total federal GNP-adjusted spending is in fact approaching record levels, more than half of the spending increase over the past ten years is attributable to increased interest on the national debt.⁷⁴ Of course, the increase in interest obligations reflects the cost of prior deficits, in this case run up during the early 1980s.⁷⁵ By definition, expenditures exceeded revenues during those years. Who was responsible for that?

The answer, beyond debate, is President Reagan. The early 1980s were the heyday of supply-side economics. Armed with an overwhelming mandate from the voters in the 1980 election,⁷⁶ the GOP's newly established control of the Senate, and a substantially reduced Democratic majority in the House, the Reagan Administration pushed through enormous tax cuts for the wealthy.⁷⁷ The Administration claimed that the cuts would be self-financing: The reduction in marginal rates at the top would spur an investment boom so large that the revenue loss from the dip in rates would be offset by a huge increase in total taxable income.⁷⁸ Indeed, the claim was not merely that the lost revenue would be made up, but that total tax receipts to the Treasury would actually *increase*.⁷⁹

70. CITIZENS FOR TAX JUSTICE, *supra* note 64, at 3.

71. See Eric Pianin, *The Budget Pact: Worst of Both Worlds?*, WASH. POST, Oct. 1, 1991, at A19 (noting a 25% cut in defense spending mandated by 1990 budget pact).

72. See, e.g., *Budget Kudzu*, N.Y. TIMES, May 17, 1991, at A24 (editorial noting that entitlements account for 75% of non-defense and non-debt-maintenance spending).

73. CITIZENS FOR TAX JUSTICE, *supra* note 64, at 3.

74. *Id.* at 10.

75. *Id.*

76. David S. Broder, *Carter Yields Early in Night; Ronald Reagan Elected in a Landslide of Electoral Votes*, WASH. POST, Nov. 5, 1980, at A1 (reporting a Reagan landslide in electoral votes and decisive victory in popular vote); Hedrick Smith, *Reagan Easily Beats Carter; Republicans Gain in Congress; D'Amato and Dodd Are Victors*, N.Y. TIMES, Nov. 5, 1980, at A1 (same).

77. The Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (codified as amended in scattered sections of 26 U.S.C.); see also Alan L. Feld, *Fairness in Rate Cuts in the Individual Income Tax*, 68 CORNELL L. REV. 429 (1983) (analyzing how the Economic Recovery Tax Act of 1981 would benefit the rich).

78. DAVID A. STOCKMAN, *THE TRIUMPH OF POLITICS* 44-76 (1986).

79. *Id.*

As we know, this never happened. The supply-side tax cuts cost the Treasury billions of dollars and failed to spur increased investment or savings.⁸⁰ Instead, the revenue shortfall was covered with borrowed dollars, an estimated 164 billion of them.⁸¹ A recent, nonpartisan study of the deficit concludes that "*the [supply-side] tax cuts for the richest one percent can explain the entire increase in the size of the federal budget deficit [during the 1980s].*"⁸²

It was against this background that the FY 1991 budget negotiations took place. The Democrats were determined to restore more progressiveness to the tax code, as had been started with the Tax Reform Act of 1986.⁸³ The Republicans, at least at the outset, took their cue from President Bush's lips and were unwilling to assent to a deficit reduction package that smacked of a tax increase. Both sides were acting from deep ideological conviction. Eventually, the President convened a budget summit with the Democratic congressional leadership. The President retreated from his campaign pledge and the leadership compromised on the top marginal tax rate.⁸⁴ Unhappy with the summit agreement, liberal Democrats and conservative Republicans initially refused to go along. Finally, however, a compromise acceptable to a majority of each house of Congress and the President was hammered out, passed, and signed into law.⁸⁵

That compromise, the Omnibus Budget Reconciliation Act of 1990, established annually decreasing deficit targets and overall federal spending limits for the following five years.⁸⁶ The limits are enforced on a "pay-as-you-go" basis: any legislation that would increase spending or lead to a revenue shortfall must be equally offset by a tax increase or spending cut in another bill or provision; if not, then automatic spending cuts take effect.⁸⁷ The deficit reduction pact further divided the budget into categories of expenditure and provided that savings realized in one category could not be applied to allow greater spending in another.⁸⁸ Without the spending cuts and additional revenues of the Act, the estimated deficit in 1996 would be approximately \$150 billion greater than under current estimates.⁸⁹ Hopefully, we are now on the path to putting our financial house in order.

This is not to overlook the fact that we remain saddled with deficits still in the hundreds of billions of dollars. The tab for our decade of hedonistic con-

80. CITIZENS FOR TAX JUSTICE, *supra* note 64, at 12, 13.

81. *Id.* at 8.

82. *Id.*

83. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended in scattered sections of 26 U.S.C.).

84. Nathaniel C. Nash, *Here's a Twist: Gains Tax is Rising*, N.Y. TIMES, Oct. 31, 1990, at D1; *The Budget Battle*, N.Y. TIMES, Oct. 9, 1990, at A20.

85. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified in scattered sections of U.S.C.).

86. *Id.*

87. 2 U.S.C.A. §§ 632(b)(7), 900-907 (West 1991).

88. *Id.*

89. David Hage, *Budget Ties That Bind*, U.S. NEWS & WORLD REP., Sept. 9, 1991, at 52.

sumption will be paid off much more slowly than it was run up, although our lessening need to spend on military security should help balance the books. Nor was it pleasant to watch prolonged partisan wrangling or suffer the inconvenience of a shutdown in government operations while the Omnibus Budget Reconciliation Act of 1990 was being stitched together.⁹⁰ On the other hand, as anyone who has ever been involved in a labor negotiation will attest, brinkmanship can be an important part of securing one's objectives. Yes, the budget fight often looked ugly. But in our constitutional system of separated powers, particularly when the legislative and executive branches are controlled by opposing parties, some conflict is inevitable, and maybe even desirable, especially when both sides are acting to implement strongly held values. Politics may be the art of compromise, but a politician who does nothing more than compromise will never be more than a "politician."

To summarize, then, criticism of Congress' role both in creating and remedying the deficits of the 1980s is, at best, exaggerated. The deficits resulted from tax breaks for the rich, which Congress largely opposed⁹¹ and which did not lift all boats as advertised.⁹² Perhaps Congress should have fought the supply-side zealots more vigorously, but the supply-siders argued at the time that theirs was the policy the electorate had endorsed in 1980. And they may well have been right: While there is no such thing as a free lunch, that does not stop people from looking—or voting—for one. Later, when the bill came due, Congress acted to pay it, but insisted that those who had eaten the meal pay their fair share. Congress' role in establishing fiscal policy over the past decade may not be praiseworthy, but it does not warrant the imposition of term limitations as a sanction.

C. *Term Limitations and the Separation of Powers*

There are two additional interrelated, process-based arguments put forward by limitations supporters that I have deferred addressing until now. The first asserts that the perquisites of office unfairly tilt the playing field in favor of incumbents. An incumbent's skillful use of the franking privilege, performance of casework for constituents, bringing of federal dollars into the district, and garnering of media attention are said to make mounting a viable campaign in opposition virtually impossible.⁹³ Second, campaign money flows disproportionately to incumbents as well, enhancing their natural advantage and, even more

90. Tourists who traveled to Washington, D.C., during the shutdown were particularly irked to discover that the Washington Monument as well as memorials and museums were closed. One visitor, upon finding the National Zoo grounds open but all of the animal houses closed, remarked: "I was in the Senate Gallery for an hour and a half last night, watching them do caucuses and roll calls and talk about the budget. And I saw more monkeys there than I could ever see at the zoo." Maureen Dowd, *The Budget Battle*, N.Y. TIMES, Oct. 7, 1990, at A1.

91. Pamela G. Gunn, *What Has Happened to the Tax Legislative Process?*, 86 MICH. L. REV. 1196, 1199 (1988).

92. CITIZENS FOR TAX JUSTICE, *supra* note 64, at 13.

93. Otteson, *supra* note 1, at 20-21.

perniciously, rendering them beholden to those (read "special interests") who provide it.⁹⁴ Congress is thereby rendered less representative than it should be.

The favorite statistic that limitations supporters cite in support of these arguments is that incumbents who chose to run for reelection in 1990 had a virtual lock on their seats: 96% were reelected.⁹⁵ While this statistic does speak moderately to the power of incumbency in the last election, it also should assuage a bit of the concern about the influence of special interests. If incumbents are in no realistic danger of being defeated, then they need not be concerned with acquiescing to the demands of special interests (or anyone else).⁹⁶ Judged historically, however, the 1990 election was an aberration. Half of the House of Representatives has turned over in the last decade,⁹⁷ eighty percent since 1974.⁹⁸ The average tenure of House members in the last Congress was a little over ten years.⁹⁹ Moreover, as is the case decennially, reapportionment in 1992 to conform congressional districts to the results of the 1990 census¹⁰⁰ will perforce bring a host of new faces into Congress. There is thus considerable turnover in Congress now. To that extent, term limitations solve a problem that does not exist.

This is not to say that the perquisites of incumbency ought not be checked nor the influence of special interest money in politics be curbed, although identifying who a special interest is poses much the same difficulty as defining where the national interest lies. Are realtors a special interest when they lobby for the deduction of interest on home mortgages that benefits millions of homeowners? Are the elderly when they press for social security increases? Environmentalists when they seek protection for forests they camp in or the loggers trying to protect their jobs who oppose them? My own inclination is to be careful about affixing the pejorative special interest label and let the political process sort out competing claims on the nation's attention and fisc. If money is permitting some to speak in that process with an unfairly loud voice, then perhaps campaign finance reform is in order.¹⁰¹ Or, better yet, guarantees

94. *Id.* at 19.

95. Chuck Alston, *Warning Shots by Voters More Mood Than Moderate*, 48 CONG. Q. WKLY. REP. 3796, 3797 (1990).

96. The assertion in the text depends, of course, upon the relationship of the size of campaign war chests to electoral success. If the high reelection rate for incumbents in the last election is predominantly attributable to their overflowing coffers, either directly because the money was spent and made a difference in the election or indirectly because it discouraged strong potential challengers from making the race, then the influence of special interest money should not be discounted. But the assertion that the amount of money spent on a given campaign might actually affect the outcome is wholly speculative, and my assertion in the text is no more or less speculative.

97. Telephone Interview with Casey Miller, Assistant to House Speaker Thomas Foley (Sept. 26, 1991) (statistics based on original research by Mr. Miller).

98. Egan, *supra* note 7, at A13.

99. Mark V. Tushnet et al., *Judicial Review and Congressional Tenure: An Observation*, 66 TEX. L. REV. 967, 976 (1988).

100. U.S. CONST. art. I, § 2.

101. On the topic of campaign finance reform, see generally GARY C. JACOBSON, MONEY IN

of broadcast media access to all candidates, which is the most important commodity money now buys.¹⁰² But congressional tenure has no direct bearing on the problem of money in politics.

Term limitations are not merely beside the point. They will further exacerbate the problems they are intended to cure. First, the power of special interest lobbyists to manipulate Congress will increase when the lobbyists have primarily impotent lame ducks and guileless rookies to seduce. If campaign money buys the loyalty of some in Congress now, wait until the institution is populated exclusively with politicians compelled to feed at the special interest trough because they lack the stature to run on their accomplishments. Second, there will be a substantial loss of institutional memory. It cannot help but hamper Congress' ability to address our increasingly complex social and economic problems when the entire institution is moved down several notches on the learning curve. Third, the quality of people willing to serve in Congress will likely suffer. Politics is a tough business. Those who enter it do so at substantial cost to their personal lives, and sometimes their finances, and at the risk of suffering the public humiliation of defeat. Most do so out of a desire to make the world conform more to their own image of how it should be. Deprived of enough time to ascend in Congress sufficiently to realize those dreams, the most talented will avail themselves of other opportunities.

The most serious danger, though, is the threat that term limitations pose to the equilibrium among the branches of government in our tripartite system of divided and separated powers. In recent years Congress has been under a sustained assault from the other branches. Turf fights between Congress and the Executive are certainly nothing new; they share constitutional power in several areas, for example the authority to make war,¹⁰³ and overlapping authority naturally leads to tension and conflict. What has changed is the judiciary's open willingness to act with the Executive to constrict congressional power, in particular to limit Congress' most fundamental power, its Article I power to make law.

The Supreme Court has acted to limit the scope of Congress' lawmaking authority by reading statutes narrowly so as not to reach conduct that Con-

CONGRESSIONAL ELECTIONS 33-50 (1980); Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045 (1985); Stephen E. Gottlieb, *The Dilemma of Election Campaign Finance Reform*, 18 HOFSTRA L. REV. 213 (1989); Daniel H. Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989); Kirk J. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 FORDHAM L. REV. 53 (1987); Marlene A. Nicholson, *The Supreme Court's Meandering Path in Campaign Finance Regulation and What it Portends for Future Reform*, 3 J.L. & POL. 509 (1987).

102. See John M. Sylvester, Note, *Equalizing Candidates' Opportunities for Expression*, 51 GEO. WASH. L. REV. 113 (1982) (advocating limited free access to broadcast media for campaign expression and public financing of congressional campaigns).

103. Article I vests Congress with the power to declare war. U.S. CONST. art. I, § 8, cl. 11. Article II makes the President the commander-in-chief of the armed forces. U.S. CONST. art. II, § 2.

gress intended the statutes to cover.¹⁰⁴ This narrowing is accomplished under the guise of giving statutes their "plain meaning," eschewing consultation of anything other than the words themselves, especially legislative history, which might provide an insight into Congress' intent. The Court's "textualist" approach has come in for considerable scholarly comment and criticism, including my own.¹⁰⁵ The point for present purposes is that the Court is steadfastly refusing to implement legislative choices. This is particularly true in the civil rights area, where Congress has found it necessary to overrule eight different Supreme Court decisions in the past dozen years.¹⁰⁶

At the same time the Court has placed Congress' intent and purpose off-limits in interpreting statutes, it has treated administrative agency views of statutory meaning as binding. The Court held in *Chevron, USA, Inc. v. National Resources Defense Council, Inc.*¹⁰⁷ that "where a statute is silent or ambiguous with respect to the specific issue . . . [agency] regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."¹⁰⁸ This rule of construction is not especially troubling where Congress has explicitly delegated the power to define statutory terms to the relevant agency. Where Congress has not done so, however, the Court is effectively permitting presidentially appointed agency officials to decide what Congress meant, substantially undercutting Congress' authority vis-à-vis the President.

Unlike when it interprets the Constitution, the Supreme Court does not have the final word on statutory meaning;¹⁰⁹ Congress does retain the prerogative of overruling erroneous readings by passing additional statutes. Legislatively overruling court decisions, however, is difficult even in the best of circumstances. Where the President agrees with the Supreme Court's view and Congress must muster the two-thirds majority necessary to override a veto,¹¹⁰ the task is even harder. But if Congress becomes a revolving door, its ability to wage a prolonged battle to protect itself from the encroachments of the other branches will be virtually nil: There will not be anyone on Capitol Hill with sufficient incentive to fight.

Thus, the imposition of term limitations will, in my view, inexorably lead to a shift in the balance of power away from Congress toward the other two

104. See Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37 (1990).

105. *Id.*; see also, e.g., T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); Nicholas A. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991).

106. These cases are collected and analyzed in Greenberger, *supra* note 104, at 38-51.

107. 467 U.S. 837 (1984).

108. *Id.* at 843-44.

109. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

110. See U.S. CONST. art. I, § 7.

branches of government.¹¹¹ That is clearly a development that some now seek and will applaud. For my part, I do not believe such a relative weakening of Congress bodes well. Whatever its shortcomings, Congress is the institution of national government that most reflects and best represents our diversity as a nation.

CONCLUSION

Underlying the arguments of limitations proponents is a sense of paradise lost. Their ideal remains the citizen legislator envisioned by the Framers, who sows his fields before he travels to the Capitol to take up the nation's business with his fellow citizens in the Spring, and hurries home to complete his harvest in the Fall. For better or worse, the press of the nation's business has rendered this vision obsolete. Term limitations will not recapture it, and they are likely to do substantial harm. Let's leave well enough alone.

111. See *supra* notes 103-10 and accompanying text.

